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No. 14-916

IN THE
Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

The Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the United States Court of Appeals for the Federal Circuit (the "Federal Circuit"). The FCBA brings together different groups across the Nation that practice before the Federal Circuit, seeking to strengthen and serve that Court by providing a forum for discussion of common concerns of the Federal Circuit and its Bar.

One purpose of the FCBA is to render assistance to the Federal Circuit and this Court in appropriate instances by submitting its views on legal issues presented in individual cases. Such submissions further the core mission of the FCBA, which includes a responsibility to promote the public interest by providing the views of informed practitioners in the subject-matter areas over which the Federal Circuit has jurisdiction.

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[*] FCBA members who are Government employees played no role in deciding whether to file this Brief or in developing the content of this Brief. The parties have filed blanket consents to *amicus curiae* briefs in support of either party or neither party. After reasonable investigation, FCBA asserts that: (a) no member of its Board or *amicus* Committee who voted to prepare this Brief, or any attorney in the law firm or corporation of such a member, represents a party here, (b) no counsel for any party has authored this Brief in whole or in part, and (c) no person or entity, other than *amicus* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this Brief. *See* Rule 37.6.

This Case touches on two areas over which the Federal Circuit has exclusive jurisdiction—Federal procurement law and Veterans law. The FCBA and its members have extensive experience with both areas of law and a vested interest in their stability and predictability.

Petitioner Kingdomware successfully invoked the statutory mandate of 38 U.S.C. § 8127(d) in proceedings before the United States Government Accountability Office ("GAO"), but a differing result was obtained before the United States Court of Federal Claims, a differing result then sustained over a vigorous dissent by a Panel majority of the Federal Circuit. The FCBA respectfully submits that a complete understanding of the history and context of Section 8127(d) is necessary to directly answer this important question.

SUMMARY OF THE ARGUMENT

The Statute is the product of Congress's repeated efforts to increase the opportunities for Veterans to participate in Federal Government Contracts. Section 8127(d) differs from other Small Business Set-Asides in both its mandatory nature and in the absence of qualifications and exceptions found in other Set-Asides. Indeed, the *only* stated exception to Section 8127(d)'s "Rule of Two" requirement that Acquisitions be set aside for Veteran-Owned Small Businesses ("VOSBs") is the discretionary authority granted to Contracting Officers to award Contracts *directly* to VOSBs *without* a Competition. 38 U.S.C. § 8127(c).

The Panel majority below erred in construing Section 8127(d)'s mandatory Set-Aside requirement as discretionary once the Department of Veterans Affairs ("VA") has met its VOSB contracting goals. That construction is inconsistent with the plain meaning of the Statute, as well as with the Regulations generally applicable to Small-Business Set-Asides, which provide that Agencies are not excused from setting aside Procurements simply because "[s]mall business concerns are already receiving a fair proportion of the agency's contracts for supplies and services." 48 C.F.R. ("FAR") § 19.502-6-(f). Although these Regulations do not directly govern Set-Asides pursuant to Section 8127(d), Congress was presumably aware of this general principle when it enacted Section 8127, and, as discussed below, Congress's language evidences an intent to provide great-

er—not fewer—contracting opportunities to Veterans. It was not a "concession" for Petitioner Kingdomware to argue that Section 8127(d)'s statutory mandate continues in full force and effect throughout each Fiscal Year even after the VA has met its VOSB contracting goals. This result follows directly from the plain meaning of the Section 8127(d) as well as from Regulatory policy applicable to Set-Asides generally at the time Section 8127 was enacted.

ARGUMENT

I. Section 8127(d)'s Unqualified, Mandatory Language Stands Out From Other Federal Contracting Set-Aside Laws And Expresses Congress's Intent That VA Acquisitions Routinely Be Set-Aside For Veterans.

Section 1827 is the product of years of Congressional frustration with the Government's persistent failure to provide meaningful opportunities for VOSBs and for Service-Disabled Veteran-Owned Small-Businesses ("SDVOSBs") to participate in Federal Contracts. Congress attempted to rectify this failure in 1999, amending the Small Business Act to establish a Government-wide goal of awarding 3% of Government Contracts to SDVOSBs. 15 U.S.C. § 644(g)(1)(A)(ii). Federal Agencies failed to meet that 3% goal. *Kingdomware Technologies, Inc. v. United States*, 754 F.3d 923, 926 (Fed. Cir. 2014).

Consequently, Congress amended the Small Business Act again in 2003 to provide that Federal Contracting Officers "*may* award" sole-source Contracts of restricted dollar amounts to SDVOSBs, and "*may* award" Contracts based on Competitions restricted to SDVOSBs "if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by [SDVOSBs] will submit offers and that the award can be made at a fair market price." 15 U.S.C. § 657f(b). Notwithstanding this *discretionary* authority, Federal Agencies continued to fail to meet Congress's 3% contracting goal for SDVOSBs. *Kingdomware*, 754 F.3d, at 926.

Congress therefore acted once again in 2006, but this time with *mandatory* legislation targeted specifically at the VA. The Veterans Benefits, Health Care and Information Technology Act of 2006, codified at 38 U.S.C. § 8127(d), provides that VA Contracting Officers "*shall* award" contracts on the basis of Competitions restricted to SDVOSBs and VOSBs if the VA Contracting Officer has a "reasonable expectation" that: (1) two or more SDVOSBs or VOSBs will submit offers, and (2) that "award can be made at a fair and reasonable price that offers the best value to the United States."

The bill's sponsor, U.S. Representative John Boozman, explained the change in language from "may" to "shall" in Section 8127's legislative history, stating that "[t]he bill will essentially change what has been a 'may' to a 'shall' in terms of goals." *H.R. 3082, The Veteran-Owned Small Business Promotion*

Act of 2005 [et al.]: Hearing before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans Affairs, 109th Cong. 2 (2005) (statement of Rep. John Boozman, Member, H. Comm. on Veterans Affairs). The Committee on Veterans Affairs' Report accompanying the legislation further explained that "small businesses owned and controlled by veterans and service-disabled veterans should *routinely* be granted the *primary* opportunity to enter into VA procurement contracts." H.R. Rep. 109-592, at 14–15 (2006) (emphases added).

Since 1984, Small Business Set-Asides, which are permitted when the so-called "Rule of Two" is met, have been used to implement the statutory requirement, 15 U.S.C. § 644(a)(3), that Small Businesses receive "a fair proportion of the total purchases and contracts for property and services for the Government." Congress has defined this required "fair proportion" as yearly minimum Government-wide percentage goals, *i.e.*, marketplace participation for all Small Business concerns of "not less than 23 percent of the total value of all prime contract awards for each fiscal year," 15 U.S.C. § 644(g)(1)(A)(i). Section 8127(d) provides a special and additional instance of Set-Asides when its "Rule of Two" is met.

The Rule of Two which applies generally to Small Business Set-Asides is set out at FAR § 19.502-2(b), and it provides that Competitions for Acquisitions over $150,000 will be reserved for exclusive Small Business participation when there is a reasonable expectation of making an Award at a fair market

price on Offers obtained from at least two responsible Small Business concerns. Critically, FAR § 19.502-6-(f) provides that Contracting Officer Rule of Two assessments are not excused even if "[s]mall business concerns are already receiving a fair proportion of the agency's contracts for supplies and services." In other words, Contracting Officers may *not* decline to undertake Rule of Two assessments even though Government-wide restricted Competition goals for a particular Fiscal Year have already been met. Although FAR Part 19 does not apply to Set-Asides under Section 8127(d), *see* FAR § 19.000(a), Congress presumably was aware of this established regulatory regime when it essentially codified a special instance of the Rule of Two in Section 8127(d).[1] *See, e.g., Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 193-94 (2002) (Congress's use of terms with an established regulatory meaning "generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.").[2]

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[1] In 2006, the rule that Set-Asides are required irrespective of whether contracting goals for a particular year have been met was located at FAR § 19.502-5(f).

[2] A Rule of Two assessment sufficient to support a VA Competition restricted to VOSBs or to SDVOSBs often begins with a public "Source Sought" notice and questionnaire or with identification of potential SDVOSBs or VOSBs through an online search of the United States Small Business Administration's Small Business Dynamic Search (http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm, last visited August 7th, 2015). If such a database search were limited only to SDVOSBs, it would on August 7th, 2015 have returned 15,635 profiles. Once multiple SDVOSBs are identified, VA Contracting Officer Rule of Two assessments need only further establish that "there is a reason-

Consistent with FAR § 19.502-6(f), Congress did not qualify Section 8127(d) to limit Set-Asides to instances in which VOSB goals had not yet been met. Congress knew how to limit the Set-Aside mandate if it wanted to. Under 15 U.S.C. § 644(r) and its implementing Regulations, FAR §§ 19.502-4 & 16.505(b)-(2)(i)(F), Contracting Officers need not conduct a Rule of Two assessment before determining whether to set-aside Task or Delivery Orders to be placed under multiple-award Contracts, because in those instances the duty to set-aside Awards for Small Businesses is entirely discretionary. *Edmond Scientific Co.*, B-410-179, B-410179.2, November 12th, 2014, *2014 U.S. Comp. Gen. LEXIS 322, *15-*17.*[3]

Similarly, unlike the Rule of Two in FAR § 19.502-2(b) which is expressly inapplicable to purchases under the Federal Supply Schedules, FAR § 8.404(a),[4] Section 8127(d) provides no such exception.

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able expectation of receiving acceptably priced offers from small business concerns capable of performing the contract." *Starlight Corporation, Inc.*, B-410471.2, December 30th, 2014, *2014 U.S. Comp. Gen LEXIS 374, *9; *Adams & Associates, Inc. v. United States*, 109 Fed. Cl. 340, 357-358 (2013) ("All that is required is a reasonable expectation.").

[3] A multiple-award Contract is one issued to several prime Contractors through which supply requirements (Delivery Orders) or service requirements (Task Orders) are competed only among these several prime Contractors.

[4] Federal Supply Schedules are for varying quantities of commercial supplies or services and are awarded to multiple Contractors agreeing to provide volume pricing discounts. *Kingdomware*, 754 F.3d, at 925. Most are awarded by the United States General Services Administration ("GSA"); other Schedule

Section 8127(d) contains none of the exceptions typically found in other Federal Contracting Set-Aside laws and regulations. Instead, the only exception to the VA-specific Rule of Two in Section 8127(d) is the discretionary authority granted to VA Contracting Officers to award Contracts *directly* to VOSBs *without* a Competition. 38 U.S.C. § 8127(c). The Statute otherwise specifies no circumstances barring year-round application of these restricted Competition requirements—VA Contracting Officers "shall award" Contracts on the basis of Competitions restricted to SDVOSBs and VOSBs if the VA Contracting Officer has a "reasonable expectation" that: (1) two or more SDVOSBs or VOSBs will submit Offers, and (2) that "award can be made at a fair and reasonable price that offers the best value to the United States." 38 U.S.C. § 8127(d).

II. The Majority Below Misread Section 8127(d) And Failed To Give Effect To Congress's Mandate.

Consider these formulations:

> A well regulated Militia, being necessary to the security of a free state, the right of the

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Contracts for medical and nonperishable subsistence are awarded by the VA. The Rule of Two is by FAR §§ 8.404(a), 38.101(b) made inapplicable to GSA Federal Supply Schedules and made inapplicable to VA Schedule Contracts. *Walker Development & Trading Group*, B-411357, July 8th, 2015, 2015 U.S. Comp. Gen. LEXIS 190, *4.

> people to keep and bear Arms, will not be infringed.

Second Amendment to the Constitution.

> [F]or purposes of meeting the [VA's aspirational] goals [concerning the yearly percentage of VA Contracts awarded to SDVOSBs and VOSBs], and under this section, a contracting officer of the Department [VA] will award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the United States [the Rule of Two].

Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127(d).

Notice that the text of each of these snippets has a prefatory, or purpose, clause followed by an operative, or command, clause. This issue is whether this special instance of the Rule of Two is to be applied by VA Contracting Officers in all Acquisitions, this per the text of its unambiguous command clause ("shall award contracts on the basis of competition restricted"), or whether its command clause is rendered ambiguous by its purpose clause (the Rule of Two ap-

plies *only* as needed "for purposes of meeting the [VA's yearly aspirational] goals").

As explained in *District of Columbia v. Heller*, 554 U.S. 570, 576-580 (2008), statutory construction tenets demand that the text of a purpose clause (a well-regulated Militia being necessary) may not limit the text of a command clause (the right of the people to keep and bear Arms) unless the text of the command clause is itself ambiguous and there is a logical connection, a link, between the text of the purpose clause and the text of the ambiguous command clause. This Court relied on these statutory construction tenets in *Heller* to find a *Second Amendment* right to keep and bear Arms unconnected with militia service, and a right to use these Arms for self-defense within one's home—concluding there is no logical connection or mandatory link in the text of the *Second Amendment* between militia service and the right to keep and bear Arms.

The command clause of Section 8127(d) requiring VA Contracting Officers to conduct a Rule of Two assessment for every Acquisition is not itself overbroad or in need of limitation just to attainment of the VA's yearly aspirational goals. This is particularly so given that Small Business Set-Asides generally are not so limited. *See* FAR § 19.502-6(f).

The text of the purpose clause also is not logically connected or linked to the text of the command clause. Consistent with that position, Kingdomware stated at Oral Argument that if the clear mandate in

the text of the command clause is not ambiguous (it is not), then VA Contracting Officers must continue with Rule of Two assessments for Acquisitions even though VA's aspirational restricted Competition percentage goals for a particular Fiscal Year have already been met. This is simply the general rule of FAR § 19.502-6(f), a point which the Panel majority did not address. It does not ignore "additional statutory language that this mandate is for the purpose of meeting the goals under *subsection (a)*." *Kingdomware*, 754 F.3d, at 933.

Circuit Judge Reyna's dissent properly applied *Heller*:

> To override the clear imperative of *§ 8127-(d)*, the panel majority relies on the provision's prefatory language to reason that requiring a Rule of Two analysis in every VA procurement "makes the mandatory goal-setting statutory provision unnecessary." Maj. Op. at 19. Prefatory language is introductory and does nothing more than explain the general purpose for the Rule of Two mandate. The Supreme Court has noted, albeit in constitutional construction, that "apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause" and that operative provisions should be given effect as operative provisions, and prologues as prologues. *District of Columbia v. Heller, 554 U.S. 570, 578 (2008)*. Here, the operative clause is that VA contracting offi-

> cers must award contracts on the basis of restricted competition if they have a reasonable expectation that the Rule of Two will be satisfied, a mandate that cannot be limited by its prologue.

Kingdomware, 754 F.3d, at 936-937. "When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

The "ambiguity" in Section 8127(d)'s statutory mandate is nothing more than a proposition invented by the VA. There is no connection or link between purpose and command—just as with broad regulatory policy, this 38 U.S.C. § 8127(d) statutory mandate is in full force and effect throughout each Fiscal Year without regard to marketplace success or failure of the Rule of Two.

CONCLUSION

For those reasons stated by the Petitioner and in the forceful dissent in the Federal Circuit, this matter should be remanded with direction to enter Judgment for the Petitioner.

Respectfully submitted.

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